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July 3, 1997

Mr. David S. Guzy Chief, Rules and Procedures Staff Royalty Management Program Minerals Management Service P. O. Box 25165, MS 3101 Denver, CO 80225-0165

RE: Policy for Release of Third-Party Proprietary Information for the Administrative Appeals Process and Alternative Dispute Resolution 62 FR 16116, April 4, 1997

Dear Mr. Guzy:

On behalf of the Independent Petroleum Association of Mountain States (IPAMS), I am submitting comments on the above-referenced proposed rulemaking. IPAMS is a non-profit, non-partisan trade association representing the interests of over 700 independent oil and natural gas producers, service/supply companies, royalty owners and energy consultants operating in the Rocky Mountain states of Wyoming, New Mexico, Colorado, Utah, Montana, North Dakota, South Dakota, Nebraska, Arizona, Nevada, Idaho, Oregon and Washington. Most of our members are lessees of federal lands who, accordingly, pay rentals, bonuses and royalties to the federal government. As such, IPAMS has a critical interest in the royalty management affairs of the Minerals Management Service.

IPAMS appreciates the MMS's dilemma. On the one hand, lessees or their designees submit information which they consider proprietary or confidential, the release of which could adversely affect their competitive position. On the other hand, the same lessees or designees are likely to appeal MMS assessments at one time or another. In the past, MMS has been unable to provide to appellants the information it used in determining those assessments.

The Independent Petroleum Association of Mountain States (IPAMS) is the regional trade association in the Rocky Mountains that represents independent oil and natural gas producers operating in a 13-state area in the West.

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Yet, while IPAMS understands MMS' intent in publishing the proposed rule, we still have several issues regarding the proposed rule and a number of recommendations we would like to communicate.

MMS overstates the holding in <u>Chrysler vs. Brown</u>, 441 U.S. 281 (1979), in that the <u>Chrysler</u> case does *not* hold that a regulation permitting or requiring release of information meets the "authorized by law" exception to the Trade Secrets Act. Instead, the court held that the mere existence of a regulation, substantive or otherwise, is not enough. There must also be a showing that the statutory grant of authority under which the regulation was issued contemplated the disclosure. No such showing has been made for any of the statutes cited by MMS as its authority for the proposed rule.

Moreover, as its primary example of why the proposed rule is necessary, MMS cites to its assessments against lessees based on the "major portion" provision typically found in a BIA lease. The lease itself, however, does not *require* "major portion" valuation and provides only that value "may, in the discretion of the Secretary, be calculated" on that basis. The inability of the MMS to utilize the "major portion" option under the lease without running afoul of the Trade Secrets Act does not demonstrate a need to create new exceptions to the Act. Rather, it demonstrates that "major portion" pricing is not a workable option in the modern gas market and should not be selected over the other options provided in the lease.

As both submitters of proprietary information and potential appellants, IPAMS members struggled with how best to address the release of proprietary information. Frankly, some IPAMS members prefer MMS not release any information under any circumstances. Nevertheless, we discussed an appellants' need to be able to obtain certain proprietary information and whether the age of the information -- now usually a year to six years old -- could affect a company's competitive position. We agreed that, in general, the older the information, the less potential for competitive harm. However, IPAMS raises the concern that MMS' stated "stretch goal" of achieving a three-year audit cycle could impact this issue and, consequently, alter our position with respect to the policy.

In addition, it must be understood that IPAMS cannot support any policy for the release of third party information absent a commitment from MMS to retain arm's-length sales as the cornerstone of the valuation regulations and the valuation benchmarks using comparable sales for non-arm's-length transactions.

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Mr. David S. Guzy Chief, Rules and Procedures Staff Royalty Management Program Minerals Management Service

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Given these qualifiers, IPAMS believes there can be a limited, controlled release of certain proprietary information. However, we feel very strongly that proprietary information should *not* be copied or removed from MMS' offices. IPAMS recommends that circumscribed proprietary information be made available for inspection only in the appropriate MMS offices under the supervision and in the presence of an MMS employee who is capable of explaining and interpreting the information. MMS should not allow copying of any proprietary information, nor permit removal of proprietary information from its offices.

This procedure would eliminate the need to charge for copying the information or producing data on magnetic tapes or computer disks. It is also logical to assume MMS would have to gather the proprietary information in order to defend an appeal, so there would be no justification for billing for research either.

IPAMS supports the provision that access to proprietary information be limited primarily to counsel for the appellant, or qualified accounting personnel employed by the appellant. As MMS recognizes, employees of the appellant who are involved in the day-to-day decisionmaking process should not be allowed to review a competitor's proprietary information. Because competitive harm could also be created by permitting review of proprietary information by outside consultants in certain instances. IPAMS recommends review of information by such consultants be strictly limited and carefully monitored by MMS.

iPAMS also believes that certain elements of proprietary information must be redacted to protect the anonymity of the information. Because the information would be made available pursuant to a request pertaining to a specific field or area, we acknowledge this will protect anonymity only in certain fields or areas due to the number of producers and the level of production. In other fields or areas, it will be impossible to ensure anonymity, for the same reason. Moreover, it must be acknowledged that providing this information to appellants still does not account for differences in those provisions in contracts (e.g., contract term, volumes dedicated to a contract, quality of production, etc.) that define comparability. However, IPAMS believes obscuring the following data elements on the MMS Form-2014 will provide adequate shielding of the information in most instances:

Box 1 - Payor's name and address

Box 2 - Payor code

Box 3a - Payor-Assigned Document Number

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Box 5 - Reserved for Preparer's Use

Box 6 - Accounting Identification (AID) Number

It should be noted that under no circumstances would IPAMS agree to the release of contracts or plant costs. The release of this kind of highly confidential information could seriously jeopardize a company's competitive position because a competitor's knowledge of this information could unduly influence ongoing and future contract negotiations. Moreover, IPAMS cannot envision any legitimate circumstance where an assessment of one lessee would be based on the actual plant costs of a third party.

MMS states in the preamble that Executive Order 12600 and the Department's regulations require the agency to notify the submitter prior to the release of proprietary information. IPAMS agrees submitters must be notified when a request for release of proprietary information is made. However, the preamble goes on to state that if the submitter provides *valid* objection to the release, MMS must redact or otherwise withhold the information *before releasing the requested material*. IPAMS requests clarification of what constitutes *valid* objection to the release of information, as well as what information would be withheld prior to releasing the requested material. What pre-release recourse do submitters have if they are unequivocally opposed to the release of the information? The proposed rule does not address this issue. MMS must provide in the final rule for situations where the submitter opposes release of his proprietary information.

MMS states that recipients of assessments based on third-party proprietary information may obtain such information if the recipient signs confidentiality agreements and liability agreements accepting all liability for wrongful disclosure. However, while the proposed rule spells out the penalties for federal employees who wrongfully disclose proprietary information without authorization, it fails to address penalties that would be imposed on recipients of proprietary information who misuse or wrongfully disclose the information. IPAMS is concerned that merely requiring a recipient to agree to assume all liability for wrongful disclosure does little to assure the submitter that his information will remain proprietary. It is a well-meaning gesture on MMS' part, but it lacks any force or effect. The final rule should better specify what sanctions would apply to a recipient who breaches a confidentiality agreement.

MMS would also require that the appellant receiving proprietary information provide all certification statements to the MMS FOIA officer within 30 days after a final

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nonappealable decision by the Department, the conclusion of ADR, or the withdrawal of the appeal or request for ADR. Notwithstanding our comments regarding the lack of force or effect of the confidentiality and liability agreements, IPAMS recommends MMS receive and retain all certification statements since, under IPAMS' recommendation, all inspection of proprietary information would be conducted in-house. In any event, this would also eliminate the need to collect the statements at the conclusion of the appellate process.

IPAMS supports the provision that an appellant be required to request access to proprietary information prior to expiration of the appellant's time to file a statement of reasons because it will prevent unnecessary delays and help to achieve the 33-month time limit mandated by the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 (FOGRSFA). The assessment itself, however, must clearly indicate the extent to which MMS relied on third party information in order to facilitate an appellant's timely request for information.

MMS states the rulemaking applies only to disposition of relevant third party proprietary information and does not grant any rights to obtain admissions, depositions, or responses to interrogatories. The proposed rule would also deny a request for proprietary information if the information was not used in the order being challenged. IPAMS stresses that MMS must limit the release of third party proprietary information only to requesters who have legal standing in a specific appeal or who are involved in ADR, and that only information specific to a certain appeal be released. IPAMS opposes any release of proprietary information for areas outside the narrow scope of an appeal or ADR as well as release of proprietary information to individuals not involved in a specific appeal or ADR.

The proposed rule specifies that an appellant may not appeal the denial of a request for relevant proprietary information *during ADR*. IPAMS questions this exclusion. Does participation in ADR assume a loss of appellate rights? Why would appellants who choose to participate in ADR be penalized by forfeiture of their right to appeal denial of a request for the information they need in order to adequately participate in ADR? This provision should be removed in the final rule.

IPAMS supports the provision that appellants be required to disclose any third party proprietary information used in an appeal or ADR because it will allow MMS to monitor what kind of proprietary information is being used and how it is being used. It may also enable MMS to further limit the amount or kind of information it releases in the

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future. There is certainly no need to supply information that is neither relevant nor useful. MMS should be required to make similar disclosure for the same reasons.

MMS requests comment on whether the rule should include release of relevant proprietary information needed to file appeals with the MMS Director or defend against civil penalties under 30 CFR Parts 241 and 251. IPAMS does not believe the cite to Part 251 is correct. Is MMS referring to Part 241.51 dealing with civil penalties authorized by FOGRMA? In any event, MMS should only allow access to relevant proprietary information with respect to these types of appeals to the same extent and with the same limitations as provided for appeal of assessments.

In conclusion, IPAMS is pleased to have an opportunity to comment on the proposed rulemaking. IPAMS believes that under strictly limited, tightly controlled circumstances, it would be permissible for MMS to release certain proprietary information to third party appellants for in-house review. However, IPAMS opposes any policy permitting the removal of proprietary information, or copies of such data *in any form*, from MMS premises. Moreover, IPAMS' support for such a policy is contingent upon retention of a valuation system using arm's-length sales and benchmarks based on comparable sales. IPAMS also opposes the release of third party proprietary information to persons without legal standing in an appeal, and the release to appellants of information for areas outside the scope of their own appeal.

Thank you for your consideration of our comments. Please contact me if you have any questions about IPAMS' comments or recommendations.

Sincerely,

Carla J. Wilson

Director of Tax and Royalty

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